C.A. Criminal Law - ... Visual identification - Division - whether judge failed to direct adequately on issue of identification - whether judge advised jury of need for special caution. APPLICATION FOR LEAVE TO APPEAL REFUSED).

Cases referred to:
① R v Oliver Whyte (1978) 25 W.I.R 430
② Rv Turnbull (1977) Q.B. 224

JAMAICA ③ Winston Bennett et al v The Queen and Richard Scott et al v The Queen Privy Council Appeals Nos 2 of 1987 and 32 of 1986.

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 230/88

✓ Court

EVIDENCE

CRIMINAL Practice

BEFORE: The Hon. Mr. Justice Rowe, P
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Gordon, J.A. (Ag.)

R. v. MICHAEL ROSE

G. Cruickshank for Applicant

Ms. Sheryl Richards for Crown

24th & 28th April, 1989

GORDON, J.A. (AG.)

In the Circuit Court division of the Gun Court held in Kingston on 1st December, 1988 before Pitter J. (Ag.) and a jury, this applicant was convicted of the murder of Ian Atkinson.

The evidence for the prosecution was contained mainly in the testimony of Devon Atkinson a brother of the deceased victim, Ian Atkinson. He said that on the night of the 7th June, 1987 his brother Ian and himself went to a dance at Elleston Flat in Saint Andrew. They left the dance together about midnight and proceeded towards Ian's home in Kintyre. Ian pushed his bicycle while the witness walked beside him going towards Tavern Drive. On reaching the swinging bridge, they stopped and spoke, then Ian moved off with his bicycle towards his home while the witness stood and watched him go off riding. Devon then walked away but kept an eye on his brother. He saw three men suddenly appear from the gully running towards Ian. They held onto Ian's bicycle. He saw two other men coming towards him. When he first saw them they were about

3/4 chain away. He said he was able to see them because "there is two flood lights, two street lights, one bottom and one atop." He was by the top light as the two men came towards him. He recognized one of the two men as the applicant whom he had seen before in Papine. He observed that the men had guns in their hands. As the two men came towards him he started to "dress back" and he heard Ian Atkinson scream out for murder. The witness was on the "top road" and Ian Atkinson on the "bottom road."

The two men who had been approaching Devon turned around "run Ian off his bicycle and start firing shots" in Ian Atkinson's direction. At that time the three men who had held Ian stood off and each armed with a long gun also fired shots at Ian Atkinson. As the witness stood on the top road looking down on what was happening on the bottom road, the applicant fired three shots at him and the witness ran to his aunt's home, where he remained until about 5.00 a.m., on the 8th June, 1987. He then went to look for Ian and saw his body on the road at the place where he had been held by the three men. There were gunshot wounds all over Ian's body. The bicycle was beside the body. The witness made a report to the police later that day and on the 28th October, 1987 at Half-Way-Tree he identified the applicant at an identification parade. Devon Atkinson said he had seen the applicant over a period of two weeks prior to the incident. He had passed him twice on the street in Papine; they never spoke. He saw him on consecutive Friday nights and had last seen him one week before the night of the 7th June, 1987. As the applicant and the other man came towards him at the time of the incident he saw their faces. He looked at them a good while. Asked to estimate the length of time he looked at the faces of the men he said "around half hour". He was further asked how long he had been in the witness box and he said one hour. The record showed he had then been in the witness box for twenty-four minutes. He admitted in

cross-examination that when he saw the two men coming towards him he dressed back and he "took his eyes off the two of them." He also said that the "accused passed the street light coming in my direction."

Acting Corporal Raymond Melbourne visited the scene of the murder. He saw the body of the deceased and observed gunshot wounds to the left side of the neck, the left jaw and several gunshot wounds all over the body. He found eight spent M-16 shells near the body. On 2nd October he saw the applicant in the lock up at Half-Way-Tree and told him he was a suspect in the case and an identification parade would be held. After the identification parade on 28th October, 1987, Acting Corporal Melbourne arrested the applicant on the capital charge.

In answer to the charge the applicant made a statement from the dock, he said:

> "My name is Michael Rose. I live at 108 Mountain View Ave. I do not know this witness My Lord, nor the one that died. Me and him was never in any fuss. When he come to the lock up at Halfway Tree I said, how can I fire an M-16 at man with a hand like this. One of my hand is fin, My Lord. I don't know anything what him talking about. That is the truth, My Lord, the whole truth."

Mr. Cruickshank obtained leave to argue one supplementary ground of appeal that:

> "The learned trial judge failed to adequately direct the jury on the issue of identification."

Mr. Cruickshank submitted that the issue of identification loomed large in the case which rested entirely on the evidence of a sole eye-witness, whose evidence was that he had previously seen the applicant on two occasions and at the time of the incident his identification was aided by floodlights. The jury had to contend with the witness' measurement of time expressed as being about ½ hour on one occasion whereas in cross-examination he said it happened in a flash. In his submission the length

of time the witness had for observation was very limited and the learned trial judge ought to have alerted the jury to this aspect as it was pivotal to the crown's case. He referred to the evidence of the witness Devon Atkinson to the effect that the light was behind the assailants and emphasized that as the witness said "the accused passed the street light coming in my direction", this would limit the witness' ability to make a positive identification.

The trial judge, he said, should have done much more than he did on identification and his failure to do so amounted to a misdirection. He referred to page 54 of the transcript where the trial judge said:

> "Now we look at the identification and as I earlier said, this is the main issue, the crucial issue because if you find that the accused man was there, was present; that he had guns and was firing at the deceased and the deceased died as a result of those gunshots, then he would be guilty of murder. So, you will have to be satisfied by this evidence so that you feel sure that the accused man was one of those five persons. On the question of identification you are to approach the evidence with utmost caution as there is always the possibility that Mr. Atkinson might be mistaken.. It is common knowledge that more than two million people inhabit Jamaica and there is a rich mixture of all races in the population. There is also the possibility that one person may bear mark resemblance to some in any given area. The further possibility exists that a honest and prudent person may make a mistake in visually identifying another. A mistake is no less a mistake if it is made honestly. It is also possible that a perfectly honest witness who makes a positive identification may be mistaken and not be aware of his mistake. In order for you to determine the quality and the cogency of the identification you must have full regard in all the circumstances surrounding the identification. Now, you ask yourself whether there was this opportunity for the witness to view the accused. He tells you that two of the men were community boys and the distance they were from him. He pointed out from the

"witness box there to the back of the courtroom. Does this give the witness an opportunity to be able to recognize this accused man? You will recall, and I repeat, that he said that he had seen this very accused just a week before at Papine and in fact he had seen him two Fridays on succession at Papine, and when he was cross-examined he said that they never spoke on those occasions they just passed each other on the street. So you have to bear all that in mind."

The evidence of the witness that he had seen the appellant twice before that night at Papine was not and indeed could not fairly have been challenged in cross-examination. However Counsel did not seek to ascertain under what circumstances and in what lighting conditions they passed each other on the street nor why the witness should have recollected the features of the applicant on those chance occasions. As the evidence stood the jury could accept that Devon Atkinson was being truthful when he said he had seen the applicant in Papine twice, up to a week before the incident. As for the witness' estimate of time the jury saw and heard him and were in a better position to assess his intelligence and his credibility. His reference to "in a flash" came in this context:

"Q. I repeat. If you don't understand. You said when you first saw the men you took two steps back, the men took four steps forward and I put to you that in this period it only took a matter of seconds, and you remember saying that it only took a matter of seconds?

A. No sir.

Q. You see Mr. Atkinson, I am putting to you that when you first saw the men over - I think you said three-quarters of a chain away - and from the time the shooting started, this happened in a flash, in seconds. Isn't that correct?

A. Yes sir."

From this it can be seen that what the witness was saying is that the shooting started or happened in a flash. The "in a flash" referred not to his opportunity for observing the approaching men but to the commencement of the shooting.

The witness said there were two floodlights one on the bottom road and one on the top road. He was at the light on the top road and when the applicant and the other man came towards him the applicant "passed the street light coming to my direction." The logical conclusion from this bit of evidence is that the applicant passed one light and approached the witness who was at or under the other street light, the rays of which would illuminate the applicant's features.

In our view the impugned directions quoted above follow closely the guidelines laid down in R. v. Oliver Whylie (1978) 25 W.I.R. 430. Whylie's case followed R. v. Turnbull (1977) Q.B. 224 and these directions were approved in Privy Council appeals Nos. 2 of 1987 and 32 of 1986 Winston Barnes et al vs. The Queen and Richard Scott et al vs. The Queen. These cases have laid it down authoritatively that where the case against the accused depends wholly or substantially on identification evidence:

> "..... the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one ... provided this is done in clear terms the judge need not use any particular form of words." (R. v. Turnbull) (emphasis mine)

The trial judge directed the jury as he was required to do and cannot be faulted.

The sentence emphasized viz, "he tells you that two of the men were community boys and the distance they were from him" contains an error in transcription. Nowhere in the evidence of Devon Atkinson did he speak about "two of the men were community boys" or anything close to that.

What does appear at page 9 is "I see two more men come into my direction." No issue was made of this by Mr. Cruickshank who agreed that the phrase quoted above could be a corruption of "two boys coming towards me."

Continuing his submissions Mr. Cruickshank said the trial judge should have dealt with the evidence surrounding the scene at Papine and put it in proper context when delivering his charge to the jury. The jury he said, should have been told in language they could understand the legal principles relating to identification so that they could intelligently apply them to their contemplation. He was not saying this was a "fleeting glance" case but having said he saw the appellant in Papine the witness did not give any reason "to concretise" the features of the appellant and the judge should have been a little more explicit in his directions. He rounded off his submission with this proposition:

> "Where a witness has seen another person on two previous occasions and there are no spectacular events surrounding the meeting and he later sees the person at night where lighting is suspect any purported identification in those circumstances ought to be treated as a first time seeing ... it ought to be treated specially."

He concluded his submissions by saying that the jury should have been advised that special care had to be exercised by them in analysing the evidence because there was no supporting or corroborative evidence; and that to recite legal principles without reference to relevant evidence was insufficient as it did not assist the jury. The only witness for the Crown was the brother of the deceased, and this relationship said Mr. Cruickshank, placed a special responsibility upon the trial judge to alert the jury to the possibility of bias on the part of the witness.

Miss Richards in reply, submitted that the summing-up was adequate. At all material times the jury could not have failed to be aware that identification was the crucial issue. She adverted to pages 55 and 56 of the summing up which followed immediately on the impugned passage. There she said the trial judge had enlarged on the factors the jury should consider when examining the identification evidence.

Devon Atkinson said he had seen the applicant twice before at Papine. As we said earlier, this evidence was not challenged in cross-

examination. The credit of the witness was not impeached; his credibility became a question of fact for assessment and determination by the jury. It was not open to the judge to invite the jury to speculate on the circumstances of the two previous encounters as there was no material on which any adverse inferences could be invited. It was open to the jury to accept or reject the evidence of the witness on this aspect. Where a witness is likely to be biased, or actuated by ill-will, or malice or has or may have an interest to serve, it is desirable that the trial judge should warn the jury of the danger of acting on his uncorroborated evidence. The fact that the witness is related to the victim, without more, does not automatically place him in any of the categories mentioned above. The applicant in his brief statement said of the witness Devon Atkinson:

> "I do not know this witness .... nor the one that died. Me and him was never in any fuss."

In our view, in the instant case, there was no need for the trial judge to give the jury a special warning as urged by Mr. Cruickshank. We think that the learned trial judge dealt adequately with the factors relevant to the evidence of identification in the passage quoted below from page 55 and 56 of the transcript:

> "The opportunity, he tells you that the man, the accused man, he saw his face when he faced him.
> Now, was the person known to him before the commission of this act, before the 8th of June? If so, for what period and under what circumstances? As I told you, he had seen him, never spoke to him, but he had seen him and the circumstances was that they had passed, seen him on the street and passed him at Papine Square.
> Again, you have to ask yourselves what were the physical condition at the time of the viewing of the accused man, place, the light, distances and whether there were obstructions. Well, the place, he told you, was on the road; that there were lights. He is telling you flood lights; you consider flood lights may be bright lights. Again, you have to use your

"own common sense and your own knowledge, perhaps you live in Kingston, you know what a flood light is. Now, the distance, two floodlights light the place, whether it generated sufficient light for him to be able to properly identify that man, if seen again. And he tells you there is no evidence of obstruction, that there was anything to obstruct his view of the accused man. Now, again you will look for the conditions under which the identification was made, and the identification was made subsequently at the parade held some four months afterwards at the Half Way Tree Police Station. Again, you will have to ask yourselves whether, having seen this person, on two occasions before, and then on the night of the incident, whether four months later he would be able to point him out as the accused man. But, you recall what the Sergeant told you, that when he told the accused man of his rights, at the parade, that he could change any part of his clothing, that the accused changed a part of his clothing and she told him he could change any place in the line that he wished, he changed to place No. 4 and the accused man, when he was called on to be identified, because when this was happening the witness was out of sight and hearing, he couldn't see what was happening in the parade room until he was called, he went and he pointed out the accused. But in all this you will have to remember what I told you about a witness doing a physical identification of person or persons; he might be mistaken, because if you, from this evidence, come to the conclusion that the accused man is mistakenly identified, then it means you would be in doubt and you would have to resolve that doubt in the accused man's favour, because if he is mistaken you wouldn't be certain he was the person there. Before you convict this accused man, you must be satisfied that the evidence given on this question of identification parade you must feel sure that when the witness Devon Atkinson said I saw that man who fired the shot, that man coming up to me, that was the same man who had a gun and firing at my brother; if you find that that is so, then it is open to you to say that the accused man is that man."

A trial judge is required to tailor his summing up to fit the circumstances of the case. From the moment a juror is called to serve he has an opportunity to assess the intelligence of the juror. The occupation of the juror is given and he hears the juror take the oath. He is able to assess how alert the jurors are to their responsibilities and bearing these factors in mind he can mould his summing up to fit the circumstances. In complex cases or where complex legal principles are involved the judge will usually be required to be at great pains to explain the concepts so that the jury can readily understand and be assisted in the discharge of their functions. The trial judge no doubt had all these factors in mind and his summation in this short case was in our view, adequate. He outlined the principles involved to the jury in simple language and in so doing followed closely the directions in Oliver Whylie. In Turnbull's case it is laid down that the "judge should warn the jury of the special need for caution ... " The judge here advised the jury to approach the evidence with utmost caution.

The jury saw and heard the witness Devon Atkinson on whom the Crown relied, they were able to assess his evidence, they heard his estimate of time, they saw the distances he indicated between himself and the applicant and the deceased and were in the best position to pass judgment on the credibility or otherwise of the witness. In R. v. Turnbull the witness had a fleeting glance of the accused: That was not so in this case.

The application for leave to appeal is refused.